United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

76-7040

United States Court of Appeals

FOR THE SECOND CIRCUIT

MOHAMED ALI and NADIA ALI,
Plaintiffs-Appellants,

against

A & G COMPANY, INC., and SAADI IBRAHIM,
Defendants-Appellees.

PETITION FOR REHEARING

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To: The Honorable Judges of the United States Court of Appeals for the Second Circuit:

Mohamed Ali and Nadia Ali, plaintiffs-appellants above named, present this, their petition for a rehearing in the above entitled cause, and in support thereof, respectfully show:

Preliminary Statement

In an opinion by Circuit Court Judge Mansfield joined in by Circuit Court Judge Smith, the Court held:

> "that the order of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, Judge, dismissing plaintiffs' action

with prejudice for lack of prosecution be affirmed on the grounds that said dismissal was within the discretion of the District Court."

A copy of said decision is hereinafter set forth in Appendix A:

Circuit Court Judge Oakes dissented stating that

"dismissal of an otherwise meritorious cause of action for misconduct of counsel is rarely, if ever, an appropriate remedy in cases of this kind. Rather the trial court should first consider the more specific and perhaps even more deterrent remedy imposing costs personally on the offending attorneys. Imposing a penalty on those responsible for wasting the court's time, while not dismissing a partys' potentially valid claim, seems to me to make the punishment better fit the crime, especially where, as here, the opposing party and its counsel have been equally neglectful of their obligations to the court."

Judge Oakes further stated that the Court must:

"first make a finding that the lesser sanction is inadequate under the circumstances. Only then should the sins of counsel be visited upon the client in an otherwise meritorious and substantial cause."

Judge Oakes concluded by stating:

"since concededly no exploration of the alternatives was made by the court in this case, indeed the trial court's form order makes provision for nothing short of Draconian dismissal—I would reverse and remand for a consideration of the feasibility of imposing costs upon counsel for the appellants".

A copy of said dissenting opinion is also hereinafter set forth in Appendix B.

As noted in Judge Oakes dissenting opinion, the Court, in its opinion, affirming the decision below, has failed to adequately consider that:

(a) dismissal of an otherwise meritorious cause of action for the shortcomings of counsel is rarely, if ever, an appropriate remedy;

(b) the Court below failed to first consider

> "the more specific and even more deterrent remedy of imposing costs personally on the offending attorneys";

(c) the sanction of outright dismissal, rather than a lesser sanction, is particularly severe where

> "the opposing party and its counsel have been equally neglectful of its obligation to the Court", and

(d) the outright dismissal of plaintiff's attempt to seek redress for serious personal injuries is particularly severe since the clients were neither active participants or instigators of their attorney's error.

Moreover, although clearly not a defense herein, plaintiffs' counsel does believe it pertinent that with the exception of the failure to promptly seek appropriate sanction against defendants for their non-compliance with plaintiffs proper pre-trial discovery demands, this case was diligently prosecuted. Plaintiffs' counsel commenced suit the very same day they were retained. Shortly thereafter plaintiffs served notices to take oral depositions. These depositions were never held because of defendants refusal to appear (again this is not offered as justification for plaintiffs failure to seek sanction but merely to provide the context hereof).

When plaintiffs received interrogatories from the defendants, plaintiffs promptly answered them within a few

weeks, although to this day one of the defendants, A & G Company, Inc. never answered plaintiffs' interrogatories.

In fact at the time the Court below issued its order of dismissal, issue was joined with one defendant A & G Company, Inc. only 3 months prior thereto and issue was joined only 6 months prior with the other defendant.

Thus, this was not a case that had dragged on because of failure of counsel to diligently prosecute, but was a current 1975 case.

The Court in its opinion affirming the decision below also failed to consider the decisions of the Second Circuit which although recognizing that dismissal for failure to prosecute lies within the discretion of the District Court and that the Federal Rules of Civil Procedure should not be construed to render the District Court helpless in the face of delays and dilinquencies, have consistently held that:

> "in the final analysis, a Court has the responsibility to do justice between man and man and general principles cannot justify denials of a party's fair day in Court except upon a serious showing of *wilful default*". (emphasis added) *Gill* v. *Stolow,* 240 F 2d, 669, 670 (2nd Cir. 1957)

In view of the foregoing, plaintiffs most respectfully petition this Honorable Court for a rehearing as to whether under the full circumstances herein, a lesser sanction would more appropriately fit the circumstances.

Facts

This is an action to recover damages for extremely serious personal injuries caused by botulism poisoning. The causes of action alleged in the complaint arose on or about February 13th or 14th, 1975 when tainted fish prepared and sold by the defendants was ingested by plaintiff Mohamed Ali.

Jurisdiction is based upon diversity of citizenship of the parties.

Plaintiffs first retained Harry H. Lipsig, P. C., to prosecute their claim on March 10, 1975. Suit was immediately instituted on that very same day.

Service of process on the defendants herein was completed by March 27, 1975. Issue was joined by service of the answer of defendant A & G Company, Inc. on June 24th, 1975 and of defendant Saadi Ibrahim, on October 2, 1975.

On May 14th, 1975, plaintiffs served a notice to take the oral deposition of defendants scheduling same for June 9th, 1975. Defendants thereupon prevailed upon plaintiffs to please accommodate them by adjourning said depositions. These depositions were subsequently adjourned four more times, *three* of which were the result of similar requests of defendants. Thus, *defendants* obtained four out of the five adjournments. As a result of these adjournments at the behest of defendants, no examinations were ever conducted, although plaintiffs continually pressed defendants for same and were ready to appear at a moment's notice.

Plaintiffs received interrogatories from defendant A & G Company, Inc., on July 30th, 1975 and promptly answered them on August 19th, 1975. On this date, plaintiffs served their interrogatories on defendant A & G Company, Inc., *which to date have never been answered.*

Although defendants claimed they were "unhappy" with plaintiffs' answers to their interrogatories at the pre-trial conference conducted before the Hon. Lloyd F. MacMahon on October 17th, 1975, *at no time prior thereto did defendants ever raise any objection to said answers to plaintiffs' counsel by motion or other form of notice.* Justice MacMahon ordered plaintiffs to supplement their answers. The additional information sought by defendants was promptly given in part to defendants immediately following the Pre-Trial Conference in the corridor of the Courthouse and was thereafter followed with written supplemental answers on November 19th, 1975 when more information became available to plaintiffs' attorney.

During the course of the Pre-Trial Conference of October 17th, 1975, the Court criticized both sides for not having pursued or negotiated settlement prior to the conference, notwithstanding the fact that plaintiffs' representative advised the Court, without contradiction, that plaintiffs' firm was ready and willing to discuss and negotiate settlement, but that defendants insisted upon completion of oral depositions before they were willing to engage in any settlement discussions.

At the conference, the Court instructed the parties that all Pre-Trial discovery was to be completed by December 17th, 1975 and that the case was to be placed on the ready day trial calendar on January 9th, 1976.

From the date of the conference, October 17th, 1975, plaintiffs' counsel, by telephone, repeatedly attempted to settle this case and/or obtain a date for pre-trial examinations of all parties. Notwithstanding plaintiffs' conscientious efforts, defendant, A & G Company, Inc. refused to cooperate and continually pleaded "give us a few days and we'll work it out", etc.

In a most sincere, but misguided, effort to avoid burdening the District Court (which bears enough of a workload

without the unnecessary added burden of motions concerning routine discovery matters) plaintiffs' counsel did not raise this matter with the Court until January 8th, 1976 when an urgent conference with the Court was sought. Counsel for plaintiffs appealed to the court below for an extension of time so that discovery could be completed and the case disposed of without having to waste the District Court's valuable time unnecessarily, but our request was refused. On January 9th, 1976, this action appeared on the ready day calendar with approximately six cases ahead of it.

Plaintiffs' counsel conscientiously attempted to reach the plaintiffs by telephone without success on the 9th, 13th and 14th days of January, 1976 to advise of the impending trial.

On January 14th, 1976, Wednesday morning, at 10:40 A.M., plaintiffs' law firm received a telephone call to appear and open the trial at 11:00 A.M. At the appointed time, representatives of the office appeared before Mr. Justice Lloyd MacMahon to advise that plaintiffs' trial attorney, who was scheduled to try the case and was the only trial attorney fully familiar therewith, was at that moment engaged on trial in the Supreme Court of the State of New York for the County of New York; that plaintiffs had not been reached and were therefore unavailable; and further that one of the defendants, Saadi Ibrahim, and his attorney, Norman C. Harlowe, were also not present and to therefore request a short adjournment of the trial herein once again.

Notwithstanding that the within action was in litigation for a mere ten months and issue was joined with one defendant only *6 months* prior to the aforesaid trial date and issue was joined as to the other defendants only *3 months* prior to said date, the court below dismissed the case for failure to prosecute.

On February 26, 1976, counsel for the plaintiffs served motion papers on the defendants herein asking the trial court to vacate its prior order of dismissal.

On the return date, March 9, 1976, counsel for the plaintiffs appeared and attempted to present all the relevant facts before Judge MacMahon. The Judge completely refused oral argument on the motion and commented only that he "would review the motion papers." His order denying this motion to vacate reflects the same lack of consideration as to the full factual background in this matter that gave rise to his first order of dismissal.

Plaintiffs promptly appealed therefrom.

Plaintiffs have a good and meritorious cause of action. Evidence recently received from the United States Food and Drug Administration establishes that the Defendants were marketing and selling contaminated and poisonous fish.

POINT I

In view of the full facts and circumstances herein, the District Court's order of dismissal was a clear abuse of discretion.

Plaintiffs most respectfully contend that a careful review of the complete history of this litigation clearly demonstrates that plaintiffs have diligently sought to bring this action to a rapid conclusion. Indeed, it is ironic that the order of dismissal of this Court would permit defendants to elude liability and thus reap reward as a result of their own dilatory conduct.

In view of the fact that it is well established that a dismissal without prejudice is a harsh sanction and should be resorted to only in extreme cases and that in determining

whether to dismiss a case for want of prosecution, the trial judge must be ever mindful that the policy of our law favors the hearing of a litigant's claim upon the merits, *Davis* v. *Operation Amigo Inc.*, 378 F.2d 101 (10th Cir. 1967); *Dyotherm Corporation* v. *Turbo Machine Co.*, 392 F.2d 146, app. dism. on other grounds, 434 F.2d 65 (3rd Cir. 1968), plaintiffs most respectfully suggest that the court below failed to thoroughly examine the complete factual background herein. An analysis of the history will show that the court below dismissed the case only six months after issue was joined as to one defendant and three months after the issue was joined as to the other defendant. Plaintiffs respectfully contend that this case was barely ripe for pretrial discovery, let alone for trial. Through no fault of the plaintiffs, examinations before trial were never held, and further, the defendant A & G Company, Inc., never even answered the plaintiffs' interrogatories. The action of the court below in dismissing the case has allowed defendants to reap the benefit of their own dilatory tactics.

Plaintiffs believe an examination of illustrative cases as to what is an "abuse of discretion" is most supportive of plaintiffs' position herein.

In *DeMeulenaere* v. *Rockwell Mfg. Co.*, 31 FRD 575 (S. D. N. Y., 1960), aff'd 312 F. 2d 209, cert. denied 374 U.S. 813, an action was brought in 1952 for treble damages over an alleged conspiracy by the defendants to destroy the plaintiff's cash register business. The case appeared on the assignment calendar twice, and was stricken in 1956. The case then appeared on the dismissal calendar four times but each time the plaintiff got an extension of time to file a note of issue on one excuse or another.

In 1960, the case was finally dismissed for want of prosecution. The Court indicated that when a plaintiff courted his dismissal for several years, had not proceeded

with due diligence to prosecute the claim, had done nothing at all during certain periods, had disregarded orders and admonitions of the Court and had wasted two years by deceiving the Court, this was a proper case of dismissal. Judge Cashin, in his opinion said:

> "I am fully aware of the seriousness of dismissing this action with prejudice for lack of prosecution. It would deny plaintiffs' their day in Court and this is not desirable. As Chief Judge Clark stated in *Gill* v. *Stolow*, 240 F.2d 669, 670 (2d Cir. 1957): 'In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of wilful default. Even though that case involved a dismissal under Rule 37 (d) of the Federal Rules of Civil Procedure and did not involve Rule 41(b), Chief Judge Clark's warning that a court should not dismiss an action with prejudice except on very substantial evidence, should not be taken lightly."

It is respectfully suggested that the evidence of the procedural history of the case at bar is not sufficient to sustain a dismissal for failure to prosecute under the doctrine set forth in *DeMeulenaere, supra,* the plaintiffs herein are being unjustly denied their day in court by reason of the stalling maneuvers of the defendants, i.e., in their failing to answer plaintiffs' interrogatories and to appear for examinations before trial.

Alamance Industries Inc. v. *Filene's* (1st Cir. 1969), 291 F.2d 142, illustrates further criteria for defining abuse of discretion. In this case, a patent infringement action, the District Court was confronted with several different actions against different defendants in different jurisdictions by the same plaintiff arising from the same patent

infringement. The plaintiff requested that a particular action be held in abeyance until issues in one of the other actions in another jurisdiction was decided. The District Court judge denied this request saying:

> ". . . when you come here, you come here to a judge that disposes of business promptly for the public interest regardless of the private interests. I am not going to have a case—I don't care what any other judge has—which lasts on my docket an inexcusably long period of time . . ." (The case had been on the docket fourteen months).

The First Circuit Court of Appeals stated the following at page 145:

> "Apparently what principally lay behind the district court's determination to try the case is to be found in its remark, made at the first hearing, that the 'public interest' of not having a case lie on its docket for fourteen months must control 'regardless of private interests'. We cannot accept this statement either as the formulation of a generally applicable principle or as a proper criteria for the disposition of this particular case. *Courts exist to serve the parties, and not to serve themselves, or to dispatch of business.* Complaints heard as to the law's delays arise because the delay has injured litigants, not the courts. For the Court to consider expedition for its own sake 'regardless' of the litigants is to emphasize secondary considerations over primary". (emphasis added)

In the instant context, the order of the court below would appear to serve itself rather than the litigants and our system of jurisprudence. The facts, as outlined elsewhere, demonstrate that no one has been prejudiced by the short passage of time herein, except Plaintiffs whose

case has been dismissed. Indeed, their only legal remedy for the injuries they have suffered has unjustifiably been denied them. This is an abuse of discretion under the criteria of *Alamance, supra.*

In *Dyotherm Corporation* v. *Turbo Machine Co., supra,* the complaint for breach of agreement was filed August 29, 1962. On October 4, 1965, the date set for trial, plaintiffs counsel appeared late and requested a continuance on the ground that the plaintiff's principal witness was ill. The Judge set the action over until the next day, when counsel again apeared late and unprepared to proceed. The defendant moved to dismiss and the Judge granted the dismissal for failure to prosecute.

In its opinion, reversing the District Court's decision, the Court of Appeals for the 10th Circuit said at 329 F.2d 148:

> "Dismissal is a harsh sanction which should be resorted to only in extreme cases. The power of the Court to prevent undue delays and to control its calenders must be weighed against the policy of law which favors disposition of litigation on its merits. *Link* v. *Wabash R.R. Co.*, 1962, 370 U.S. 626, 82 S.Ct. 1368, 8 L.Ed. 2d 734; *Meeker* v. *Rizley,* 10th Cir. 1963, 324 F.2d 269; 5 Moore, Federal Practice para. 41.11 [2] 3, (2d ed.)"

Finally, in *Davis* v. *Operation Amigo, Inc., supra,* the complaint was filed on December 10, 1965; an order of attachment was issued the same day. Two of the defendants answered on December 27, 1965 while the remaining defendants answered on January 13, 1966. Plaintiffs replied to counterclaims on January 17, 1966. The case was set for trial on the merits of March 3, 1966. On February 28, 1966 a new trial date of March 29, 1966 was set. On March 28, 1966, plaintiff's counsel moved for a continuance

because of the illness of the plaintiff. The Court overruled the motion and dismissed the complaint, giving judgment to the defendants on their counterclaims. On the appeal, the Circuit Court stated that the dismissal was less than four months after the case was filed and about two months after it reached issue. It was apparent that discovery was only completed shortly before dismissal and was certainly not completed by March 3, 1966, the date initially set for the trial. The Circuit Court ruled that "dismissal came at a time when the case was barely ripe for pre-trial."

Plaintiffs respectfully reiterate that the history of the litigation in the instant action is not very dissimilar from that presented in *Davis, supra,* and that it too was "barely ripe" when it was dismissed by the Court below.

POINT II

The District Court's decision denying Plaintiffs' motion to vacate completely ignores the full factual history herein.

Shortly after Judge MacMahon's order of dismissal, plaintiffs made a motion to vacate said order of dismissal returnable before Judge MacMahon. On the return date, March 9, 1976, plaintiffs' counsel attempted to call to Judge MacMahon's attention many salient facts which he believed Judge MacMahon failed to consider in his order of dismissal. Upon counsel's first words of argument, the Judge curtly informed counsel that the Judge had heard all he wanted to hear and would not accord counsel any opportunity to offer oral argument but would review the motion papers. These papers were similar to the present appeal brief and outlined the same facts and law.

On March 30, 1976, Judge MacMahon issued memorandum number 44139 denying plaintiffs' motion to vacate the order of dismissal.

If plaintiffs have committed a wrong, that wrong consisted of two acts, i.e. (a) going overboard in extending professional courtesy to a fellow brother of the bar in acceding to his request to adjourn depositions and (b) in view of what has transpired, demonstrating too great a reluctance to burden the court with motions to impose sanctions for failure to meet routine and proper pre-trial discovery demands.

Plaintiffs certainly share Judge MacMahon's concern for obviating unnecessary calendar "log jams" and fully recognize that such "log jams" may preclude other litigants from having their day in court. However, the facts and history of this particular litigation do not warrant the denial of these litigants' day in court. Effective administration of our courts is certainly an important need and goal, but it must not be used as an excuse to prevent and foreclose plaintiffs herein from being accorded their day in court.

CONCLUSION

In view of the history of this litigation as set forth herein, plaintiffs have at all times in a spirit of cooperation diligently and expeditiously sought to bring this action to a rapid conclusion. It is most ironic that the order of dismissal of the District Court permits defendants to escape liability and thus reward them for deliberate dilatory behavior.

Plaintiffs have a good and meritorious cause of action.

Evidence received recently from the U. S. Food and Drug Administration conclusively proves that the defend-

ants were marketing and selling contaminated and poisonous fish.

To deny plaintiffs their day in Court as a result of defendants' willful refusal to cooperate would *not only be antithetic to the interests of justice, but contrary to the intent of the Federal Rules of Civil Procedure.* The instant case was in litigation for a mere ten months and was dismissed six months after the joinder of issue with one defendant and only three months after the joinder of issue with the other defendant. To dismiss for failure to prosecute under the complete circumstances presented herein constitutes a clear abuse of discretion.

It is most respectfully submitted that the rights of these litigants should *under these circumstances* take precedence over the Court below's concern as to decongestion of its calendar.

WHEREFORE, upon the foregoing grounds it most respectfully requested that the aforementioned petition be granted and that the judgment of the District Court upon further consideration be reversed.

Respectfully submitted,

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APPENDIX A

The Court's Decision

MANSFIELD, *Circuit Judge:*

In this diversity suit for personal injuries in the Southern District of New York, Judge Lloyd F. MacMahon, at a pretrial conference of the parties on October 17, 1975, directed that discovery be completed by December 17, 1975, and the case be placed on his ready trial calendar on January 9, 1976. An order signed by the judge and all counsel was entered accordingly, which provided that following the addition of the case to the ready calendar on January 9, 1976, the parties should be ready for trial on short telephonic notice and that failure to comply might "result in the court's taking appropriate steps to terminate the action."

On January 8, 1976, well after discovery was supposed to have been finished and only one day before the case was to go on the ready trial calendar, counsel for plaintiffs-appellants requested that trial be delayed because he had not yet completed discovery. The court refused this request, and the case appeared on the ready trial calendar the next day. When the case came to trial on January 14, 1976, appellants' counsel advised the court that neither the attorney who was to try the case nor appellants were available. The court then dismissed the case with prejudice for lack of prosecution and later denied appellants' motion to vacate that dismisal. We affirm.

Dismissal of a case for failure to prosecute lies within the discretion of the district court. *Taub* v. *Hale*, 355 F.2d 201 (2d Cir.), *cert. denied*, 384 U.S. 1007, *rehearing denied*, 385 U.S. 924 (1966). Here appellants and their counsel were guilty of three separate delinquencies. First, they failed to advise the court of the problem caused by the

defendants' failure to submit to discovery until the eve of trial, long after the date by which discovery was supposed to have been completed. Under Rule 37, F.R.Civ.P., it was appellants' responsibility to raise the defendants' lack of cooperation in discovery prior to December 17, 1975. Had a timely motion been made, the court might have entered an appropriate order against the defendants and, if they failed to comply, enforced sanctions against them or adjourned trial. But the failure of appellants' counsel to move until the time when the case was actually to be tried placed the court in an intolerable position.

Secondly, although the trial date was known well in advance and appellants should have arranged their affairs so as to be available for trial, they failed to do so. Lastly, their trial counsel, with similar notice of the trial date, also failed to appear. It is no defense that one of the defendants and his counsel failed to appear at trial. Had appellants appeared at trial, they could have moved for a default judgment against the defendant that did not. The Federal Rules of Civil Procedure should not be construed to render a district court helpless in the face of delays and delinquencies on the part of all parties to a case.

Our affirmance is not to be construed as a blanket approval of the practice of automatically dismissing a complaint with prejudice for the plaintiff's failure to appear at trial, as is indicated by the form order used by the trial judge in the present case. The sound exercise of discretion requires the judge to consider and use lesser sanctions in the appropriate case. Here, however, the combination of three different delinquencies on the part of appellants and their trial counsel presented an unusually egregious case in which Judge MacMahon did not abuse his discretion in dismissing the action with prejudice.

Affirmed.

APPENDIX B

OAKES, *Circuit Judge* (dissenting):

I dissent.

As the majority opinion persuasively demonstrates that the trial judge in this case had the ultimate discretionary authority to dismiss for lack of prosecution and, perhaps, the factual predicate for exercising that authority, had lesser sanctions been considered and rejected with cause. I believe, however, that dismissal of an otherwise meritorious cause of action for the misconduct of counsel is rarely, if ever, an appropriate remedy in cases of this kind. Rather, the trial court should first consider the more specific and perhaps even more deterrent remedy of imposing costs personally on the offending attorneys. Imposing a penalty on those responsible for wasting the court's time, while not dismissing a party's potentially valid claim, seems to me to make the punishment better fit the crime, especially where, as here, the opposing party and its counsel have been equally neglectful of their obligations to the court.

The power to impose costs on attorneys as a disciplinary measure is a well-settled, if perhaps infrequently used, facet of a court's inherent authority over the attorneys who practice before it. *See,* Note, *Civil Procedure —Power of Federal Courts to Discipline Attorneys for Delay in Pretrial Procedure,* 38 Notre Dame Law 158, 161-66 (1963); Note, *Dismissal for Failure to Attend a Pretrial Conference and the Use of Sanctions at Preparatory Stages of Litigation,* 72 Yale L.J. 819, 829-32 (1963). Courts in this circuit have imposed costs on counsel both under their inherent power and under a complementary federal statute, 28 U.S.C. § 1927. *See Bardin* v. *Mondon,* v. *Steiner,* 201 F. 63 (2d Cir. 1912); *Schneider* v. *American* 298 F.2d 235 (2d Cir. 1961); *Motion Picture Patents Co.*

Appendix B

Export Lines, Inc., 293 F. Supp. 117 (S.D.N.Y. 1968) (MacMahon, J.); *Shapiro* v. *Freeman*, 38 F.R.D. 308 (S.D.N.Y. 1965) (MacMahon, J.); *Austin Theatre, Inc.* v. *Warner Bros. Pictures, Inc.*, 22 F.R.D. 302 (S.D.N.Y. 1958); *In re Realty Associates Securities Corp.*, 53 F. Supp. 1013 (E.D.N.Y. 1943). The costs may be imposed for negligent or reckless action by an attorney that wastes the court's time and increases the expenses of the court or the opposing party. *See Bardin* v. *Mondon, supra*, 298 F.2d at 237-38. *But see Gamble* v. *Pope & Talbot, Inc.*, 307 F.2d 729 (3d Cir.) (en banc), *cert. denied*, 371 U.S. 888 (1962).

If a district court finds the lesser remedy inadequate in a given case, or finds that the client was an active participant in or instigator of his attorney's misconduct, the court clearly has the ultimate authority to dismiss the case. But I would hold that the court must first make a finding that the lesser sanction is inadequate under the circumstances. Only then should the sins of counsel be visited upon the client in an otherwise meritorious and substantial cause. Such a rule would allow me to resist the temptation to ask with Jeremy Bentham

> whether justice be a thing worth having, or no? and if it be, at what time is it desirable that litigation should be at an end? after justice is done, or before?

J. Bentham, *Rationale of Judicial Evidence*, in 7 Works of Jeremy Bentham 172 (J. Bowring ed. 1843).

Since concededly no exploration of the alternatives was made by the court in this case—indeed, the trial court's form order makes provision for nothing short of Draconian dismissal—I would reverse and remand for a consideration of the feasibility of imposing costs on counsel for the appellants.

Service of ~~[illegible]~~ Two (2) copies of
the within is
hereby admitted this 13th day
of Oct. , 1976 2:40 p.m

Attorney for

Copy received
[signature]

Service of ~~[illegible]~~ Two (2) copies of
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hereby admitted this day
of , 197.

Leahey & Johnson
Attorney for